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No. 83-802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY; MISSOURI PACIFIC RAILROAD COMPANY; THE KANSAS CITY SOUTHERN RAILWAY COMPANY; THE KANSAS AND MISSOURI RAILWAY AND TERMINAL COMPANY; UNION PACIFIC RAILROAD COMPANY; ST. JOSEPH AND GRAND ISLAND RAILWAY COMPANY, a subsidiary of Union Pacific Railroad Company; and MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,

Petitioners,

v.

C. MICHAEL LENNEN, Secretary of Revenue of the Department of Revenue of the State of Kansas; PHILIP W. MARTIN, Director, Division of Property Valuation of the Department of Revenue of the State of Kansas; and THE DEPARTMENT OF REVENUE OF THE STATE OF KANSAS, an administrative agency of the State of Kansas,

Respondents.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 22.5 of the Rules of this Court, Petitioners submit the following reply to the briefs filed by the State Respondents and County Respondents:

1. Reply To The Respondents' Argument That This Case Presents A "Request For An Advisory Opinion."

The State and County Respondents contend that this Court's determination of the legal issue raised by the Petition will have no effect upon the outcome of this case.

They argue that the district court resolved all factual issues against the railroads, that the district court's factual findings are unassailable, and that the railroads cannot, therefore, prevail on the merits.[1] This argument is nonsense.

The district court's findings of fact are based upon the erroneous premise that Section 306(1)(a) requires proof of retaliation.[2] Similarily, the court of appeals' conclusions are based upon the different, but equally erroneous, premise that Section 306(1)(a) requires proof of intentional discrimination. Neither court determined whether Section 306—as it is written and without regard to the motivation on intent of state officials—has been violated. The railroads contend that the express language of Section 306 entitles them to such an interpretation.

2. Reply To The State Respondents' Contention That The Question Presented For Review Is Being Raised For The First Time.

The State Respondents assert that the railroads have raised the question presented for review for the first time in their petition.[3] This argument is completely disingenuous.

Throughout these proceedings, the railroads have consistently maintained that they have an unqualified right under Section 306(1)(a) to obtain relief from a discriminatory state assessment, regardless of whether that discriminatory assessment is achieved by overvaluation of rail transportation property, by the underassessment of

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[1] State Respondents' Brief, p. 9-10.

[2] The district Court's observation that the railroads had failed to prove overvaluation of their property *under Kansas law* is irrevelant.

[3] State Respondents, p. 11.

locally-assessed commercial and industrial property, or by a combination of both factors. It is not, therefore, the railroads who have vacillated in their interpretation of Section 306 or in their statement of the issues involved in this case. It is, rather, the district court and the court of appeals who have refused to apply Section 306(1)(a) as it is written and who have given conflicting reasons for their refusal to do so. Indeed, it is the differing interpretations given to Section 306(1)(a) by the courts in this case which warrant the grant of certiorari.

3. Reply To The Respondents' Arguments Based Upon Congressional Intent.

Throughout these proceedings the railroads have relied upon the plain language of Section 306(1)(a) to justify their right to federal relief from discriminatory overvaluation. By contrast, the district court and the Tenth Circuit have relied upon the legislative history of Section 306 to support an interpretation of the act which is at odds with the plain language of the statute. In their response to the railroads' petition, the State and County respondents have also relied upon citations to the legislative history of Section 306 to support their contention that the court of appeals' decision is correct and that certiorari should be denied.[4] Under the circumstances of this case, however, such reliance upon legislative history is misplaced.

Where statutory language is clear and unambiguous, as is the language of Section 306(1)(a), Congress' intentions must be divined from the words of the statute, not from its legislative history. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980). In *Aloha Airlines, Inc.* v. *Director of Taxation of Hawaii*, 104 U.S. 291 (1983), the Supreme

[4] State's Respondents' Brief, p. 12.

Court of the State of Hawaii sought to avoid the preemption by 49 U.S.C. § 1513(a) of a state gross receipts tax on airlines. (49 U.S.C. § 1513(a) forbade states from imposing any tax, fee, or head charge on persons traveling by air in interstate commerce.) The Hawaii Supreme Court attempted to avoid the conflict between Hawaii law and 49 U.S.C. § 1513(a) by ignoring the plain language of the federal act and by interpreting its provisions according to the putative legislative history of the act. This Court rejected that approach and stated:

> [W]hen a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.

104 U.S. at 294-95.

The plain language of Section 306(1)(a) unambiguously requires a mathematical equivalence between two assessment ratios, one of which cannot be determined without ascertaining the true market value of rail transportation property. The plain language of Section 306(1)(a) entitles railroads to establish that a discriminatory assessment ratio has resulted from the overvaluation of railroad property. Respondents' efforts to divine a contrary meaning from the legislative history are, therefore, inappropriate.[5]

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[5] The State Respondents' interjection of constitutional questions at this stage of the proceedings is also inappropriate. No allegations of unconstitutionality were raised below. At the hearing on the preliminary injunction, the Respondents limited their legal arguments to whether the district court had jurisdiction to hear valuation as part of Section 306 litigation and addressed their comments primarily to Congress' intent in enacting Section 306. No discussion of constitutional issues is reflected in the record or in the opinions of the district court and the court of appeals.

CONCLUSION

Reduced to essentials, the Respondents' argument is that this case is not "ripe" for certiorari. Apparently, Respondents do not dispute that this case presents an issue of overriding national importance which must ultimately be resolved by this Court.

By imposing a requirement of intent where none exists under the statute, the Tenth Circuit has significantly altered the character of Section 306 and impaired its effectiveness as a tool for eliminating state tax discrimination against railroads. Resolution of the issue of whether an intent requirement may be engrafted on the plain language of Section 306 will not only permit the final adjudication of this case on its merits, but will also permit the proper adjudication of similar Section 306 cases pending in other jurisdictions. Thus, judicial economy and prudent judicial administration will be served by the grant of certiorari in this case; nothing will be served by postponing the resolution of this issue to a later date. The railroads respectfully submit that the court of appeals, and the district court, have erred in their interpretation of Section 306(1)(a) and that a petition for certiorari should issue to clarify the meaning of this important federal statute. Additionally, the railroads submit that, in view of this Court's recent decision in *Aloha Airlines*, the error of the court of appeals and the district court is so plain that this is a proper case for summary disposition on

the merits in favor of the railroads pursuant to Rule 23 of the rules of this Court.

Respectfully submitted,

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